BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

PIERCE SPECIALIZED EQUIPMENT COMPANY
(Petitioner-Appellant)

PRECEDENT
TAX DECISION
No. P-T-2
Case No. T-67-33

Employer Account No.

DEPARTMENT OF EMPLOYMENT (Respondent)

The petitioner has appealed from Referee's Decision No. SF-T-1943 which denied its petition for reassessment of an assessment made by the Department of Employment on November 7, 1966. The assessment was made under the provisions of Unemployment Insurance Code section 1127 with respect to the six-calendar-quarter period extending from October 1, 1963 through March 31, 1965, and in the amount of $29.43 for balancing account tax, $105.63 for employer contributions, and $70.66 for employee contributions, to all of which interest is added as provided by law. The petitioner and the department have each presented written argument to us in support of their respective positions in this appeal.

STATEMENT OF FACTS

During the period under review, the petitioner was a corporation existing under the laws of this state. Its principal officers were its president, Lewis H. Bishop; and its vice-president, Bruce Dohrman. Its office, originally located in Burlingame, was moved during the period to San Carlos.

The petitioner was engaged in the manufacture of specialized bindery equipment used in the printing industry. More specifically, it produced a perforating machine used primarily in the graphic arts industry. Its machines were sold throughout the United States (including Puerto Rico) and Canada, and were exported to Europe, South America, and the Far East.

Most of the petitioner's equipment (about 99%) was sold through printing equipment dealers, who as supply houses for the printing trade, handled hundreds and even thousands of other items. Altogether, there were about 250 such dealers who sold the petitioner's machines, of whom about 50 to 75 were regular active dealers. They received a thirty percent discount on the retail sales price of the product.

All inquiries in regard to the petitioner's equipment were referred to dealers. However, there were a few sales made directly to ultimate users of the equipment, probably not more than two or three during the period under review. Such sales occurred where the machine was custom-made for the user; where the customer was inconveniently located to a dealer; or where he refused to buy through one.

Because of the great number of items that the dealers handled, they often were not too familiar with the petitioner's equipment, particularly with its installation, operation, and maintenance. Prior to March, 1963, the petitioner had no outside representative to contact its existing dealers, arrange for new ones, or to stimulate the sale of its equipment. It was for this purpose that in March, 1963, the petitioner engaged the services of Raymond P. Watts, whose status is the subject of these proceedings.

After several weeks of preliminary negotiations, an arrangement was agreed upon whereby Mr. Watts was to undertake to act upon his own as a traveling representative of the petitioner anywhere in the world. He was free to choose his own itinerary and schedule, although the petitioner did assist him in setting these up. He was to pay all of his own expenses.

In the main, the contract by which Mr. Watts' services were engaged was oral. However, certain particular provisions of it were reduced to writing and signed by the parties around March 14, 1963. These included stipulations relating to Mr. Watts' status as an agent, his method of compensation, and his responsibilities for expenses and taxes.

Mr. Watts was given the designation of "general sales manager." Primarily it was to be his function to keep in touch with the various dealers and with prospective dealers, building up relations with them and maintaining their good will. He was the only one engaged for this purpose, and, contrary to the indications of his title, he did not manage any personnel in the petitioner's organization.

On his travels Mr. Watts carried the petitioner's equipment with him and demonstrated it to dealers and prospective dealers to familiarize them with its uses and operation. He ran sales meetings for the dealers, went out with them to work on their customer leads, and otherwise devoted his efforts to the promotion of the petitioner's sales. He tried to get the dealers to push the sale of petitioner's equipment and to stock certain of it.

In most cases, the dealers sent their equipment orders directly to the petitioner. It was not Mr. Watts' primary function to procure direct orders, but rather to do things indirectly that would stimulate them. However, he did occasionally transmit an order for a dealer or a customer.

Also, after a sale had been made, he sometimes serviced the installation of the equipment for the customer. About 25% of his time was devoted to this type of activity. As a rule, there was no servicing involved in maintaining the equipment, but on a few occasions he did service trouble which developed in the operation of the machine.

In the course of his travels, Mr. Watts also arranged to attend about three national trade shows a year which were set up by different associations in the printing industry. The shows were held in major centers like New York, Chicago, and Los Angeles. He also attended occasional regional shows and dealer open houses.

The trade shows generally lasted about three or four days. They provided a concentrated means of exhibiting existing equipment to printers and dealers with

the idea of interesting the printer and stimulating dealer activity. They were one of the best means of exposure of a new product to a large number of people.

The trade shows were not considered to be an expense of the sales manager. Accordingly, the petitioner bore the charge for space at the show, for the expense of electricity, and for the other miscellaneous expenses of the booth. Mr. Watts contributed his time to man the booth and arranged his itinerary so as to be able to do so. Selection of exhibits was either by mutual agreement or at Mr. Watts' choice.

During a portion of the year Mr. Watts operated in and out of the petitioner's office servicing nearby dealers in California and keeping in touch with others by correspondence. During this time he also developed advertising copy. While at the petitioner's office, but not elsewhere, he utilized the petitioner's facilities.

Before leaving the petitioner's office and at intervals while away from it, Mr. Watts furnished the petitioner with itineraries showing the areas that he planned to cover and schedules showing when he expected to be at particular places. Generally, these would cover periods of two or three weeks at a time. This was done so that he could be reached by prospects, dealers, and customers, as well as by the petitioner. Mr. Watts maintained regular communication with the petitioner, although occasionally his communication did lag by a few days.

While traveling, Mr. Watts generally worked very long days, according to his own testimony about 14 or 15 hours over most of the period. He arranged his own schedule and was under no obligation to vary it to suit the petitioner's convenience. While there were some occasions when he did so at the petitioner's request, there were other occasions when the petitioner suggested that he make certain changes in his itinerary to work in special situations which arose, and which he refused to do.

While working at, and out of, the petitioner's office in Burlingame or San Carlos, Mr. Watts' hours were still under his own control. Upon one occasion,

the general manager of the company, Stanley Finn, told him that he was supposed to be at work at 8 a.m. He told the general manager that he would come in at 8:30 and promptly complained to the company president, Lewis Bishop, about the general manager's interference.

Mr. Watts was already a skilled salesman and had some experience in the printing field prior to his becoming associated with the petitioner. There was no need to give him any training in the arts of salesmanship. At the commencement of the relationship he was instructed in regard to the petitioner's particular equipment and its operation so that he would be in a position to discuss it intelligently with dealers and customers.

Mr. Watts' remuneration for his services was by way of commission. He was to receive five percent of all sales made by the company, whether he personally made the sales or not. However, there was not a clear understanding between the parties as to whether this was to be five percent of gross sales before the thirty percent dealer discounts or five percent of net sales after such discounts. Because of this, a dispute developed between them that resulted in deteriorating relations and ultimately in litigation between them.

Under his compensation agreement Mr. Watts was entitled to draw $625 on the first and on the fifteenth of each month as an advance against commissions. Settlements of the differences between advances and earnings were to be made periodically. However, because of the dispute which developed over the commission base, no final settlements agreeable to both parties ever were reached.

Mr. Watts used his own car in carrying on his work. In accordance with the compensation agreement, he paid his own expenses. These were of a very substantial order, amounting to more than $8,000 out of annual commissions of around $15,000 that were paid to him.

The evidence clearly reflects the petitioner's belief that Mr. Watts' services to it were to be rendered as an independent contractor. The written

agreement signed by the parties states that he is to be considered as a commission agent and not as an employee. In it, Mr. Watts states that he has gone into this question with the Internal Revenue Service and that it is his responsibility to file his own estimated income returns, pay his own social security taxes, and maintain adequate travel expense records and supporting data. No tax deductions were taken out of the commission payments made to Mr. Watts.

The working relationship came to an end on March 31, 1965 when the petitioner notified Mr. Watts that his services would no longer be needed. Because of the commission payment dispute, the relationship terminated in an atmosphere of strained feelings that made its further continuance undesirable to either party. The evidence does not establish that the petitioner acted pursuant to a right to terminate, but merely that it assumed the initiative in bringing about a mutually acceptable event.

On September 24, 1965 Mr. Watts filed a disability insurance claim with the department, which was denied on the grounds that he did not have sufficient base period earnings to establish a valid claim. Upon his appeal, a referee held Mr. Watts was an employee of the petitioner during his disability claim base period and directed the department to establish a claim for him based upon his earnings from the petitioner. From this decision the petitioner filed an appeal to this Appeals Board which we dismissed for lack of jurisdiction.

The principal question presented in the proceeding now before us relates to Mr. Watts' status as an employee of the petitioner or an independent contractor for unemployment insurance tax purposes. In addition, the department asserts that in reliance upon the referee's disability decision, it has paid benefits to Mr. Watts; and that, accordingly, an estoppel should operate in its favor in regard to the assessment of taxes related thereto. In this connection it argues we are estopped from further proceedings in this matter.

REASONS FOR DECISION

In Disability Decision No. D-66-181, we dismissed an appeal by the present petitioner from the referee's decision holding that Raymond P. Watts was an employee

of the petitioner during a portion of the period in question. We did this because an employer is not a proper party-appellant from a referee's disability decision (Disability Decision No. D-640). In our dismissal decision we stated that the employer would be afforded its rightful opportunity to protect its interests in a proceeding of the present type if an assessment of taxes should be made against it.

Subsequently, such an assessment was made, and the question of the petitioner's liability for taxes is now directly before us. The proper resolution of that question rests squarely upon a correct determination of the character of the working relationship between the petitioner and Raymond P. Watts. The petitioner has the right to receive our independent and impartial appellate administrative review of that issue.

The outcome of the prior disability proceeding cannot serve to estop the petitioner from now asserting before us that Mr. Watts was not an employee. The petitioner cannot be estopped by the disposition of a proceeding from which it could not appeal. We cannot be estopped by a referee's decision which we did not and could not review on its merits.

If, as a result of the outcome of this tax proceeding, the department finds itself in the position of having paid out disability benefits to Mr. Watts for which it cannot collect employee contributions through an employer, this is because the department did not offset against those benefits at the time that it paid them, the amount of the contributions which Mr. Watts should have made to the Disability Fund as a prerequisite to his entitlement to any benefits from it. In this connection we should not lose sight of the fact that the employee contributions which finance the disability program are the primary liability of the employee, himself. The employer deducts and remits these contributions only as an agent of the state. The employer who fails to deduct is only secondarily liable for the amount that he did not withhold. If there is to be any estoppel, it could only be against assertion by a claimant, whose disability claim was allowed or upheld, that he is not liable for the offsetting taxes that have never been deducted from his pay (La Societe Francaise

de Bienfaisance Mutuelle v. California Employment Commission (1943), 56 Cal. App. 2d 534 at page 555, 133 P. 2d 47 at pages 57 and 58, certiorari denied by the U.S. Supreme Court, 320 U.S. 736, 88 L. Ed. 436, 648 S. Ct. 35; in the matter of Kit Kat Club, Inc. (1944), Southern Division of the United States District Court, Northern District of California No. 30393-R, 1944 Compilation of California Court Decisions Involving the California Unemployment Insurance Act 84 at page 86.

Moreover, it would seem that a failure to offset the employee contributions which the claimant should have paid in such status against the disability benefits allowed to him might very well be an act that would exonerate the secondary liability of the employer at least to some extent. In the matter before us, however, the question of exoneration does not really arise until after the character of the working relationship has been resolved, and then only if it is resolved in a manner that would impose a tax responsibility of this type upon the petitioner. The first problem, therefore, is to determine whether the services of Mr. Watts were rendered to the petitioner in a taxable working relationship.

Unemployment insurance taxes accrue only on amounts paid as remuneration for services rendered by employees. The relationships of employer and employee and of principal and independent contractor have long been recognized to be mutually exclusive. They cannot exist simultaneously with respect to the same transaction. The proof of the one status automatically precludes the existence of the other. Accordingly, the services of an independent contractor are not "employment" within the meaning of Unemployment Insurance Code section 601, and the remuneration paid for such services is not taxable. Boswell v. Laird (1857), 8 Cal. 469 at pages 489 and 490, 68 Am. Dec. 345 at pages 348 and 349; California Employment Stabilization Commission v. Morris (1946), 28 Cal. 2d 812 at page 816, 172 P. 2d 497 at page 499; Bevan v. California Employment Stabilization Commission (1956), 139 Cal. App. 2d 668 at page 681, 294 P. 2d 524 at page 532; Statutes of 1953, Chapter 528, section 4.

The determination of the status of Raymond P. Watts as an employee or an independent contractor must be made in accordance with the principles of the common law from

an evaluation of a group of factors pertaining to the rendition of his services. These factors have been collected and conveniently stated in section 220(2) of the American Law Institute's Restatement of the Law of Agency. They have been held to govern the determination of status for unemployment insurance purposes in Empire Star Mines Company, Limited v. California Employment Commission (1946), 28 Cal. 2d 33 at page 43, 168 P. 2d 686 at page 692, and in a number of other cases. Sudduth v. California Employment Stabilization Commission (1955), 130 Cal. App. 2d 304 at pages 311 and 312, 278 P. 2d 946 at page 951.

In this evaluation there is no single factor which determines the status of the workman. However, great emphasis usually is placed on the extent to which the principal has the right to control the workman's manner, mode, methods, and means of performing the details of his work. This is commonly referred to as the "principal test" or the "most important factor." Isenberg v. California Employment Stabilization Commission (1947), 30 Cal. 2d 34 at page 39, 180 P. 2d 11 at page 15; Tomlin v. California Employment Commission (1947), 30 Cal. 2d 118 at pages 122 and 123, 180 P. 2d 342 at page 345; Sparks v. L. D. Folsom Co. (1963), 217 Cal. App. 2d 279 at pages 284 to 287, 31 Cal. Rptr. 640 at pages 643 to 645.

This test involves the existence of a control right as distinguished from the exercise of control. Press Publishing Company v. Industrial Accident Commission (1922), 190 Cal. 114 at page 121, 210 P. 820 at page 823; Murray v. Industrial Accident Commission (1932), 216 Cal. 340 at page 346, 14 P. 2d 301 at page 303; Garrison v. State of California (1944), 64 Cal. App. 2d 820 at page 824, 149 P. 2d 711 at page 713. The exercise of control is of significance to the test. It may provide an indication by way of inference of the right's existence. It is not, however, the test itself. Lewis v. Constitution Life Company of America (1950), 96 Cal. App. 2d 191 at page 196, 215 P. 2d 55 at page 58. Other evidence alone may be sufficient to show that a control right existed without being accompanied by any evidence of control actually being exercised. Brietigam v. Industrial Accident Commission (1951), 37 Cal. 2d 849 at page 855, 236 P. 2d 582 at page 586.

In some situations, there are express provisions in the working agreement in regard to the right of control; or there are express provisions in regard to powers of direction or control over the performance of the work from which the existence or absence of a control right may reasonably be inferred. These provisions, while not conclusive of the fact, are prima facie evidence of it. They are entitled to great weight in the absence of indication that they have not been observed according to their tenor in carrying on the work. Luckie v. Diamond Coal Company (1919), 41 Cal. App. 468 at pages 478 and 479, 183 P. 178 at pages 182 and 183; Garrison v. State (1944), supra, 64 Cal. App. 2d 820 at page 826, 149 P. 2d 711 at page 714. They have little or no weight where they have not been observed. Bartels v. Birmingham (1947), 332 U.S. 126 at page 131, 91 L. Ed. 1947 at page 1954, 67 S. Ct. 1547 at page 1550, 172 A.L.R. 317 at page 323; Mark Hopkins v. California Employment Stabilization Commission (1948), 86 Cal. App 2d 15 at page 18, 193 P. 2d 792 at page 793; Candido v. California Employment Stabilization Commission (1949), 95 Cal. App. 2d 338 at pages 340 and 341, 212 P. 2d 558 at page 559.

In other situations, the services are rendered without express stipulations either affirming or negating the right of control, or clearly delineating the powers of direction and control over the performance of the work. The existence or absence of the right must then be determined from reasonable inferences. These may be drawn from the circumstances surrounding and attending the making and execution of the contract considered in conjunction with the nature of the contract and the duties ordinarily to be performed thereunder. Press Publishing Company v. Industrial Accident Commission (1922), supra, 190 Cal. 114 at page 120, 210 P. 820 at page 823.

The extent to which the control right exists is of fundamental importance to the test. A principal beneficially interested in work being performed has a right to retain limited controls over manner and means of performance for definite and restricted purposes without thereby becoming an employer. Western Indemnity Company v. Pillsbury (1916), 172 Cal. 807 at page 811, 159 P. 2d 721 at page 723; Bohannon v. McClatchy Publishing Co. (1936), 16 Cal. App. 2d 188 at page 199, 60 P. 2d 510 at pages 514 and 515; People v. Grier (1942), 53 Cal. App. 2d Supp. 841 at pages 855 and 856, 128 P. 2d 207 at

page 214; Manchester Avenue Company v. Stewart (1958), 50 Cal. 2d 307 at pages 313 and 314, 325 P. 2d 457 at pages 461 and 462. Complete abnegation of control is not essential to the status of an independent contractor. Lewis v. Constitution Life Company of America (1950), supra, 96 Cal. App. 2d 191 at page 195, 215 P. 2d 55 at page 58; Bates v. Industrial Accident Commission (1958), 156 Cal. App. 2d 713 at page 718, 320 P. 2d 167 at page 171.

To be indicative of an employment relationship, the control which the principal has a right to exercise over the workman must be of that degree and type which the courts have characterized as "complete" and "authoritative." Winther v. Industrial Accident Commission (1936), 16 Cal. App. 2d 131 at page 136, 60 P. 2d 342 at pages 344 and 345; S. A. Gerrard Co. v. Industrial Accident Commission (1941), 17 Cal. 2d 411 at page 414, 110 P. 2d 377 at page 378; Burlingham v. Gray (1943), supra, 22 Cal. 2d 87 at pages 94, 99, 101, and 102, 137 P. 2d 9 at pages 13, 15, 16 and 17; Baugh v. Rogers (1944), 24 Cal. 2d 200 at page 206, 148 P. 2d 633 at page 637, 152 A.L.R. 1043 at page 1048; Shoopman v. Pacific Greyhound Lines (1959), 169 Cal. App. 2d 848 at page 853, 338 P. 2d 3 at page 7. This is an "entire" control (within the meaning of Labor Code section 3000), Giacomini v. Pacific Lumber Co. (1907), 5 Cal. App. 218 at page 221, 89 P. 1059 at page 1060; Fay v. German General Benevolent Society (1912), 163 Cal. 118 at page 121, 124 P. 844 at page 845; an "absolute" control, Crooks v. Glens Falls Indemnity Co. (1954), 124 Cal. App. 2d 113 at page 121, 268 P. 2d 203 at page 207; a "supreme" control, Luckie v. Diamond Coal Co. (1919), supra, 41 Cal. App. 468 at page 480, 183 P. 178 at page 183; a "full and unqualified right to control" details and means, Barton v. Studebaker Corporation of America (1920), 46 Cal. App. 707 at page 717, 180 P. 1025 at pages 1028 and 1029; Lee v. Nanny (1940), 38 Cal. App. 2d 90 at page 92, 100 P. 2d 832 at page 834; a control of "all material details" of the rendition of services, Sudduth v. California Employment Stabilization Commission (1955), supra, 130 Cal. App. 2d 304 at page 310, 278 P. 2d 946 at page 951; a control of the activities "in so far as it is feasible to control a type of service," Bevan v. California Employment Stabilization Commission (1956), supra, 139 Cal. App. 2d 668 at page 680, 294 P. 2d 524 at page 532; a right of general control not only as to what shall be done, but when and how it shall be done as well, Moody v. Industrial Accident Commission (1928), 204 Cal. 668 at

page 671, 269 P. 542 at page 543, 60 A.L.R. 299 at page 302; Mountain Meadows Creameries v. Industrial Accident Commission (1938), 25 Cal. App. 2d 123 at page 129, 76 P. 2d 724 at page 727; Sparks v. L. D. Folsom Company (1963), supra, 217 Cal. App. 2d 279 at pages 286 and 287, 31 Cal. Rptr. 640 at pages 644 and 645.

Strong evidence of an employment relationship may sometimes be found in the right of a principal to discharge the workman at will without cause. Such a right is generally incompatible with the control which an independent contractor usually enjoys over his work. As such, the right becomes an evidentiary circumstance tending to show the subservience of the workman, and pointing in the direction of that completeness of control which the courts recognize as one of the best tests of an employment relationship. Press Publishing Company v. Industrial Accident Commission (1922), supra, 190 Cal. 114 at pages 119 and 120, 210 P. 820 at page 823; Phillips v. Larrabee (1939), 32 Cal. App. 2d 720 at pages 725 and 726, 90 P. 2d 820 at page 823.

A right to discharge at will without cause is most convincing evidence in those situations where a workman would feel a sufficient threat from the possibility of discharge and its consequences to cause him to yield to the pressure of the principal or his methods in regard to performing the details of the work. Tomlin v. California Employment Commission (1947), supra, 30 Cal. 2d 118 at page 123, 180 P. 2d 342 at page 345. It loses persuasive force where such a threat is neither explicitly nor implicitly present, and is not very convincing in most situations where the parties have only dimly contemplated their termination rights. A right to discharge at will is never conclusive of the relationship, and evidence of it should always be appraised in the light of the surrounding circumstances. California Employment Stabilization Commission v. Morris (1946), supra, 28 Cal. 2d 812 at page 819, 172 P. 2d 497 at page 501; Anderson v. Badger (1948), 84 Cal. App. 2d 736 at page 741, 191 P. 2d 768 at page 771.

A right to discharge only for cause, or after a reasonable period of notice, does not usually carry the same implications as a right to discharge at will without cause. Empire Star Mines Company, Limited v. California Employment Commission (1946), supra, 28 Cal. 2d 33 at page 45, 168 P. 2d 686 at page 693. Where the

right is clearly in the nature of a limited control not incompatible with an independent contractor relationship, an inference of employment does not arise. Teller v. Bay & River Dredging Co. (1907), 151 Cal. 209 at page 211, 90 P. 942 at page 943, 12 L.R.A. (N.S.) 267 at pages 272 and 273, 12 Ann. Cas. 779 at page 780; Fay v. German General Benevolent Society (1912), supra, 163 Cal. 118 at page 122, 124 P. 844 at page 845; Winther v. Industrial Accident Commission (1936), supra, 16 Cal. App. 2d 131 at page 136, 60 P. 2d 342 at page 345. Nor does it arise where it cannot be exercised against the individual workman alone. Western Indemnity Company v. Pillsbury (1916), supra, 172 Cal. 807 at pages 812 and 813, 159 P. 721 at page 723.

The right to discharge at will must also be distinguished from the right of every principal to refuse to enter into further contracts. This latter right does not constitute evidence of a right of control or of an employment relationship. California Employment Stabilization Commission v. Wirta (1946), 75 Cal. App. 2d 739 at page 743, 171 P. 2d 728 at page 730. Particularly in situations involving a continuous series of separate transactions, it may be difficult to distinguish which of these two rights is actually present. Compare Pacific Lumber Co. v. Industrial Accident Commission (1943), 22 Cal. 2d 410 at page 415, 139 P. 2d 892 at page 895, with the Wirta case, supra. Doubtful situations are not likely to give rise to very forceful inferences in support of either an employer's right of control or a contractor's independence of it.

While the extent of the control right is the prime factor to be considered in evaluating the true character of the working relationship, it is not the only factor. Due consideration must also be given to a series of subordinate tests relating to the conditions under which the services of the workman were rendered. In a number of cases, the California courts, using language essentially the same as that of the Restatement of the Law of Agency, have enumerated the secondary factors to be considered as:

(a) Whether or not the one performing services is engaged in a distinct occupation or business;

(b) The kind of occupation, with reference to whether, in the locality, the work

is usually done under the direction of the principal or by a specialist without supervision;

(c) The skill required in the particular occupation;

(d) Whether the principal or the workman supplies the instrumentalities, tools and place of work for the person doing the work;

(e) The length of time for which the services are to be performed;

(f) The method of payment, whether by the time or by the job;

(g) Whether or not the work is a part of the regular business of the principal;

(h) Whether or not the parties believe they are creating the relationship of employer-employee.

Empire-Star Mines Company, Limited v. California Employment Commission (1946), supra, 28 Cal. 2d 33 at page 43, 168 P. 2d 686 at page 692; Perguica v. Industrial Accident Commission (1947), 29 Cal. 2d 857 at page 860, 170 P. 2d 812 at page 814; Isenberg v. California Employment Stabilization Commission (1947), supra, 30 Cal. 2d 34 at page 39, 180 P. 2d 11 at page 15; Malloy v. Fong (1951), 37 Cal. 2d 356 at pages 370 to 373, 232 P. 2d 241 at page 250; Bates v. Industrial Accident Commission (1958), supra, 156 Cal. App. 2d 713 at pages 718 and 719, 320 P. 2d 167 at page 171; and numerous other cases.

Each of these secondary tests is an area of evidentiary interest that is apt to vary in its finer shades of meaning and emphasis as it is related to the situation presented in the individual case. Accordingly, the various factors are weighed together by being judged rather than counted. In this judging process, factors which are merely more numerous may yield to the strength of more directly indicative ones as they concatenate to form an overall picture of the working relationship. It is from this integrated picture, rather than from any mere consideration of component parts, that the true status of the workman is finally determined. Rathbun v.

Payne (1937), 21 Cal. App. 2d 49 at page 51, 68 P. 2d 291 at page 292; Burlingham v. Gray (1943), supra, 22 Cal. 2d 87 at page 103, 137 P. 2d 9 at page 17.

In applying these tests which distinguish an independent contractor from an employee to a situation such as we have before us, there is a particular caution that should be exercised. The petitioner engaged the services of Raymond P. Watts especially for the purpose of representing it in certain dealings with third persons. It has, in other words, engaged Mr. Watts to render services as an agent within the meaning of Civil Code section 2295.

The Restatement of the Law of Agency 2d (1958) makes particularly clear in a special new comment (in section 14N at page 80 of volume 1), that agency is a status which can exist in conjunction with either an employment or an independent contractor relationship. It points out that agents who are not subject to the control or right of control of the principal with respect to their physical conduct in the performance of their services are independent contractors. It goes on to say that most persons known as "agents" are in fact independent contractors rather than employees. Agents of this type have been held to be independent contractors in Garrison v. State of California (1944), supra, 64 Cal. App. 2d 820, 149 P. 2d 711; California Employment Stabilization Commission v. Morris (1946), supra, 28 Cal. 2d 812, 172 P. 2d 497; California Employment Stabilization Commission v. Norrins Realty Co. (1946), 29 Cal. 2d 419, 175 P. 2d 217; and in other cases.

All agents, whether they be employees or independent contractors, owe their principals the basic obligations of an agency relationship which include such duties as loyalty and obedience to instructions. We cannot distinguish between the status of an employee and that of an independent contractor merely upon the basis of those aspects of the working relationship which arise out of its agency character. These become meaningful only when they are probed to a deeper level that reveals whether under the circumstances of the particular case they provide an instrumentality of sufficiently general control over the details of the performance of the work to warrant a proper inference of employment status. See

Garrison v. State of California (1944), supra, 64 Cal. App. 2d 820 at pages 827 and 828, 149 P. 2d 711 at pages 714 and 715.

The picture of the working relationship which emerges out of the concatenation of the factors in this case indicates to us that Mr. Watts was engaged to act as an independent contractor. Essentially, he was engaged to use his best efforts and his skills to promote the sale of the product which the petitioner manufactured. In so doing, his theater of activity was potentially the entire world, to be covered and developed to the extent and in the manner of his own choosing; and, we think most significantly, at his own expense.

In this connection, we note particularly that a very substantial proportion of his gross remuneration - indeed, well over half - was expended for this latter purpose. This is a proportion far in excess of what it would be usual to find in the case of one engaged as an employee. It is a strong indication that Mr. Watts carried on his activity as a distinct business of his own.

This is further confirmed by the way Mr. Watts approached his task at least during most of the period, devoting hours to it that were regular only in the sense that he regularly worked each day up to the limits of his endurance. They were not the kind of regularly established hours that are customarily observed by one who works as an employee of another. The choice of these hours and any variations in them were his.

The evidence clearly reflects that Mr. Watts was not amenable to taking instructions that were not to his liking. His behavior in this regard clearly stamps such instructions as were given as suggestions rather than orders. Suggestions are not indicative of an employer's right of control. Western Indemnity Co. v. Pillsbury (1916), supra, 172 Cal. 807 at page 813, 159 P. 721 at page 724; Moody v. Industrial Accident Commission (1928), supra, 204 Cal. 668 at page 671, 269 P. 542 at page 543, 60 A.L.R. 299 at page 302.

Mr. Watts' occupation was essentially that of a salesman. This is an occupation which is carried on under a wide variety of different working conditions, and both independent and employed salesmen are very commonly encountered. Even more so than is the case with most occupations, the proper classification of a salesman rests upon the particular facts of his individual working conditions. Brown v. Industrial Accident Commission (1917), 174 Cal. 457 at page 460, 163 P. 664 at page 665; Royal Indemnity Company v. Industrial Accident Commission (1930), 104 Cal. App. 290 at page 293; 285 P. 912 at page 913; Isenberg v. California Employment Stabilization Commission (1947) supra, 30 Cal. 2d 34 at pages 40 and 41, 180 P. 2d 11 at page 16.

This is well illustrated in our Tax Decision No. 2360 wherein, because of differences in the conditions under which they carried on their sales work, we found both independent contractors and employees existing among a number of salesmen selling the same product for the same principal under the same form of written agency appointment. In our Tax Decision No. 2327, we analyzed a number of our previous tax decisions involving salesmen, and attempted to extract and group together characteristic working conditions that tend to cause them to be placed in the one classification or the other. In this connection, we note particularly how reasonably similar Mr. Watts' conditions of work were to those which we describe as characteristic of the independent salesman.

Mr. Watts was already skilled in the arts of his occupation and experienced in its application to the printing field prior to the commencement of the working relationship. The nature of the duties that he was to perform and the locations where they were to be carried out would seem to indicate that the parties were relying upon his skill and experience to perform them independently. While the record reflects a close interest upon the part of the petitioner in his efforts and accomplishments, it cannot really be said that he carried on the performance of his work under the petitioner's supervision.

In this regard, it should be kept in mind too that Mr. Watts was an agent. As such, he owed the petitioner certain duties of loyalty and obedience to instructions

in regard to the subject of the agency. We find nothing in any demands that the petitioner may have made upon him in these respects that reaches beyond the level of limited controls by a beneficially interested principal. Such controls, alone, are not indicative of an employment relationship.

Mr. Watts' status as an agent was not coupled with an interest in the subject of the agency. Accordingly, it was the right of either party under Civil Code section 2355 to terminate it by renunciation. The petitioner's exercise of this agency status right under the circumstances described does not indicate that it was an exercise of an employer's right to discharge at will without cause.

Strong motives pressed upon Mr. Watts which caused him to view his relationship with the petitioner as employment from the vantage point of hindsight. The jurisdiction of the labor commissioner in the dispute over his remuneration and his right to disability benefits are two clear examples. However, these pressures were not in the picture when the work was undertaken and are not particularly reflective of his belief in regard to his true status. More significant are the written provisions of the working agreement, which he signed shortly after the commencement of the relationship and which definitely negate any such intent upon his part.

In the overall picture of the working relationship, there are certain component parts which, if viewed in isolation, might seem to indicate that Mr. Watts was an employee of the petitioner. For example, among other things, the petitioner paid the expenses of the sales booths which Mr. Watts manned at trade shows; it furnished cards and samples he carried on the road; and it provided certain minor services while he was around its office. It is, however, not from such isolated facts alone but from the integrated picture of the whole relationship that we must reach our conclusion in regard to Mr. Watts' status.

Keeping this in mind then, what is the real significance of such facts as these? Can it really be said that because the petitioner bore certain minor expenses of the agency Mr. Watts did not really carry on his

activity as a distinct business of his own, when out of his annual commissions of around $15,000 he spent more than $8,000 of his own money for this purpose? Is it reasonable to conclude from facts such as these that the petitioner provided the instrumentalities and place of Mr. Watts' work when the latter provided his own automobile, lodging and other travel needs and established his own itineraries and schedules? Are facts like these indications that the petitioner had a right of control over a man who would not change his itinerary or vary his working hours except to suit his own convenience? Particularly, do they indicate that kind of complete and authoritative control that the courts have characterized as the hallmark of an employment relationship? The self-evident answers to these questions clearly illustrate why the determination of status must be made from the overall picture of the whole relationship, and not just from the isolated indications of component parts.

We hold, therefore, that Mr. Watts was an independent contractor in his working relationship with the petitioner during the period under review. Accordingly, the petitioner is not liable for the contributions assessed. Our holding makes it unnecessary to consider the question of exoneration of the petitioner from secondary liability for the employee contributions assessed.

DECISION

The decision of the referee is reversed. The petition is granted.

Sacramento, California, **January 24, 1968.**

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